the mortgagees against allowing priority to receiver's certificates, but apparently with little result, for an analysis of the cases seems to show that where the proceeds of the sale of the certificates were to be used to pay priority claims, the certificates themselves will be given priority.[14] It does not appear whether this can be explained on the doctrine of subrogation or not. A recent case decides that when the proceeds have been used in paying the coupons of the bonds that were secured by the mortgage, the certificates will then also be given preference. *American Trust Co.* v. *Metropolitan Steamship*[15] *Co.*, 190 Fed. 113 (C. C. A., First Circ.). This can hardly be explained as subrogation, for the coupon-holders would only have been entitled to share in the final distribution on the same terms as the bondholders.[16] But by extending the doctrine of priority claims to include all expenses incurred in preserving the property, as well from the claims of mortgagees as from physical destruction,[17] this decision, according as it does with the current of authorities, can be satisfactorily explained. Thus, without the aid of legislation, and despite our bankruptcy rule,[18] America has nearly reached the satisfactory position long since attained by England.

REVIEW OF ORDERS IN HABEAS CORPUS PROCEEDINGS. — The weight of authority denies review by appellate courts of adjudications in *habeas corpus* proceedings.[1] *Wisener* v. *Burrell*, 28 Okl. 546, 118 Pac. 999. Any logical explanation of this variation from the general policy of allowing litigants to bring their disputes before courts of review must be found in some substantial peculiarity of *habeas corpus* proceedings. The explanation cannot be that such proceedings present no reviewable questions.[2] For upon *habeas corpus*, questions dealing with the jurisdiction of courts,[3] the validity of ordinances,[4] and the construction[5] and constitutionality[6] of statutes may be raised. Nor can the doctrine be justified on any of the procedural grounds proposed by the decisions.

company contracted in the ordinary course of its business shall be paid out of current receipts before he has any claim upon such income." See Southern R. Co. *v.* Carnegie Steel Co., 176 U. S. 257, 285, 20 Sup. Ct. 347, 358.

[14] Wallace *v.* Loomis, 97 U. S. 146; Miltenberger *v.* Longansport Ry. Co., 106 U. S. 286, 1 Sup. Ct. 140; Union Trust Co. *v.* Illinois Midland Ry. Co., 117 U. S. 434, 6 Sup. Ct. 809.

[15] No distinction has been made in the cases between a steamship company and a railroad. Whelan *v.* Enterprise Transportation Co., 175 Fed. 212. See Trust Co. *v.* Chapman, 208 U. S. 360, 28 Sup. Ct. 406 (Canal Co.).

[16] Newbold *v.* P. & S. R. Co., 5 Ill. App. 367.

[17] Lurton, J.: "I do not think that the duty of preserving the property in charge of the receivers is limited to a mere preservation of the physical structure of the railroad." See Lloyd *v.* Chesapeake, etc. R. Co., 65 Fed. 351, 358.

[18] See 1 WYMAN, PUBLIC SERVICE CORPORATIONS, § 352, n. 1.

[1] No distinction has been made between review at common law, by writ of error, and under general statutes allowing appeals.

[2] See Cox *v.* Hakes, 15 App. Cas. 506, 523.

[3] *In re* Bonner, Petitioner, 151 U. S. 242, 14 Sup. Ct. 323.

[4] *In re* Garfinkle, 37 Wash. 650, 80 Pac. 188.

[5] *In re* Authers, 22 Q. B. D. 345.

[6] Medley, Petitioner, 134 U. S. 160, 10 Sup. Ct. 384.

The first of these, found in the early English *dicta* which gave rise to the doctrine, is that adjudications in *habeas corpus* proceedings lack the technical requisites of reviewable judgments.[7] It is questionable whether this reasoning is even technically sound.[8] Some of the American cases suggest that a party defeated in a *habeas corpus* suit can bring similar proceedings before other judges.[9] But this lacks the true nature of an appeal,[10] and it is nowhere suggested that in the absence of statute a court of review can issue writs of *habeas corpus*. A third justification, that *habeas corpus* proceedings are before judges, and that the statutes allowing appeals relate only to proceedings before courts,[11] is proposed by but few of the cases, and instances a refinement of technicality.

The substantial reasoning to be found in the decisions rests upon the doctrine underlying the writ of *habeas corpus*, namely, the need of a speedy adjudication of a person's right to the custody of an infant or to liberation from illegal imprisonment. This doctrine can best be tested by dividing the orders in *habeas corpus* proceedings into those discharging a prisoner, remanding him, and awarding the custody of infants. As to the first class, the principle that a party be not concluded by the decision of an inferior court, and the principle directing the summary liberation of one under illegal imprisonment clash. The latter would be violated by a review the pendency of which stayed the order of discharge. The former would not be satisfied by a review which did not operate as a *supersedeas*, because the resulting possible absence of the discharged prisoner might defeat any relief given by the court of review. The greater importance of the *habeas corpus* principle justifies the disallowance of review of orders of discharge.[12] The opposite should be true as to orders remanding the petitioner.[13] The need for a summary remedy here necessitates the interposition of the appellate court. For though the prisoner might get the same kind of relief on review of the ordinary proceeding under which he was imprisoned as on review of the *habeas corpus* suit, the earlier conclusion of the latter would result in its earlier review. Furthermore, the imprisonment may be under no proceeding whatever. Orders awarding the custody of infants present a similar situation.[14] Effect can be given to a decree of reversal, for the

[7] See City of London's Case, 8 Coke 121 b, *127 b; King *v.* Dean and Chapter of Trinity-Chapel, 8 Mod. *27, *29, 1 Str. 536, 537, 542. But see Regina *v.* Paty, 2 Salk. 503, 504.

[8] See Co. Lit. 288 b.

[9] See Coston *v.* Coston, 25 Md. 500, 506. Before The Habeas Corpus Act, 1640 (16 Chas. 1, c. 10), not even this was true. See Thomas Rudyard's Case, 2 Vent. 22, 24; 3 Bl. Comm. 131.

[10] See Cox *v.* Hakes, *supra*, 523.

[11] See Weddington *v.* Sloan, 15 B. Mon. (Ky.) 147, 153; Guilford *v.* Hicks, 36 Ala. 95, 96.

[12] By writ of error: Hammond *v.* People, 32 Ill. 446; Coston *v.* Coston, *supra*. By appeal: Weddington *v.* Sloan, *supra*; State *v.* Miller, 97 N. C. 451, 1 S. E. 776. *Contra*, State *ex rel.* Keyes *v.* Buckham, 29 Minn. 462, 13 N. W. 902; Winnovich *v.* Emery, 33 Utah 345, 93 Pac. 988.

[13] By writ of error: Yates *v.* People, 6 Johns. (N. Y.) 337. *Contra*, Wade *v.* Judge, 5 Ala. 130; *Ex parte* Thompson, 93 Ill. 89. By appeal: Barriere *v.* State, 142 Ala. 72, 39 So. 55. *Contra*, Bell *v.* State, use of Miller, 4 Gill (Md.) 301; Howe *v.* State, 9 Mo. 690.

[14] By writ of error: *Contra*, Wilkinson *v.* Murphy, 20 Ala. 104. By appeal: Queen *v.* Barnardo, [1891] 1 Q. B. 194. *Contra*, Ferguson *v.* Ferguson, 36 Mo. 197.

court of review can retain control over the infant.[15] Here the need for summary relief is not so great, and the case will be rare where the requirement of security from the prevailing party will prevent his obtaining the infant. The general disregard of any distinction such as that suggested above[16] has resulted in a denial of review of any order in *habeas corpus* proceedings.

ELECTION OF REMEDIES BY SELLER IN CONDITIONAL SALE. — Like other contracts, a contract for a conditional sale depends for its interpretation on the reasonable intent of the parties. The intent of the parties to such a contract seems most completely analogous to the intent of the parties in a mortgage contract.[1] The buyer, as the mortgagor, is to have the complete beneficial use of the property, including even the right to transfer possession and enjoyment of it by sale or mortgage;[2] while the seller, as the mortgagee, is to retain the legal title, merely as security to insure the payment of the purchase price.

The failure to follow this analogy, however, has led in most jurisdictions to the doctrine that in case of default by the buyer, the seller has the choice of two inconsistent alternative remedies and by certain acts, which manifest his intention to rely on one remedy, he is considered as waiving his right to the other. For example, suing for the price is usually held such an election as to vest title in the buyer and to preclude the seller from reclaiming the property.[3] On the other hand, reclaiming the property usually precludes him from suing for the price.[4] The ordinary doctrine of election of remedies is applied. But it is submitted that what is contracted for is not inconsistent alternative remedies but concurrent remedies, the very purpose of one of which is to insure the enforcement and satisfaction of the other.[5] Furthermore, to say that by election on the part of the seller title is passed to the buyer seems contrary[6] to the ordinary rules for transfer of title which require mutual assent by the buyer and seller to some specified act of appropriation. The only act of appropriation agreed upon in such a contract is the discharge of

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[15] See Queen *v.* Barnardo, *supra*, 214.

[16] See Yates *v.* People, *supra*, 432. But see Cox *v.* Hakes, *supra*, 535.

[1] Chicago Ry. Equipment Co. *v.* Merchants' National Bank of Chicago, 136 U. S. 268, 10 Sup. Ct. 999. See WILLISTON, SALES, § 330.

[2] Carpenter *v.* Scott, 13 R. I. 477; Ames Iron Works *v.* Richardson, 55 Ark. 642, 18 S. W. 381.

[3] Recovering judgment is a binding election although this is not satisfied. Crompton *v.* Beach, 62 Conn. 25, 25 Atl. 446; Ramey *v.* Smith, 56 Wash. 604, 106 Pac. 160. So also is merely commencing a suit which is discontinued. Orcutt *v.* Rickenbrodt, 42 N. Y. App. Div. 238, 59 N. Y. Supp. 1008; Frisch *v.* Wells, 200 Mass. 429, 86 N. E. 775.

[4] Minneapolis Harvester Works *v.* Hally, 27 Minn. 495, 8 N. W. 597; Nashville Lumber Co. *v.* Robinson, 91 Ark. 319, 121 S. W. 350.

[5] "Just as the mortgagee may sue for the price and also foreclose his mortgage upon the property, so the seller in a conditional sale should be allowed to sue for the price and also reclaim the property, not as his own, but for the purpose of foreclosing it; . . ." WILLISTON, SALES, § 571, n. 39. See also Judge Sanborn's opinion in Manson *v.* Dayton, 153 Fed. 258, 272.

[6] Bierce, Ltd. *v.* Hutchins, 205 U. S. 340, 346, 27 Sup. Ct. 524, 525.